## Obligations to rehabilitate: the interaction between civil law and labour and social security law

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***published in***
Publiek/ Privaat: Vervlechten of ontvlechten?
2010

***document version***
Publisher's PDF, also known as Version of record

## 4.2. OBLIGATIONS TO REHABILITATE: THE INTERACTION BETWEEN CIVIL LAW AND LABOUR AND SOCIAL SECURITY LAW

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### 4.2.1. RESEARCH TOPIC

***Introduction***
When an employee becomes the victim of an accident or other event for which another party is liable, different areas of law are involved. Liability law provides the employee with a right to recover damage from the liable party. Labour law and social security law provide for an entitlement to continued payment of the employee's salary, or to a social security benefit. Such entitlements, however, come with obligations. For instance, an employee has the duty to mitigate damage, in so far as this can reasonably be required, and he has far-reaching obligations to rehabilitate into the workplace. These obligations originate from different areas of law and are not co-ordinated as regards content. This causes legal uncertainty.

***Occupational disability and occupational rehabilitation***
In order to achieve that sick employees return to gainful employment as soon as feasible, major legislative changes have been implemented in the area of labour law and social security law in the past few years.

Until 1996, employers were obliged to continue salary payments to sick employees during a relatively short period. Such obligatory continued salary payments were only supplementary in nature, as employees were also entitled to a benefit under the *Ziektewet* (Sickness Benefits Act), which was deductible from the salary. At the time, this Act only pertained to the first year on sick leave. After that, employees usually qualified for a full benefit under the *Wet op de Arbeidsongeschiktheidsverzekering* (*WAO*) (Invalidity Insurance Act).

In 1996, the division of the responsibility for income continuity during sick leave changed fundamentally with the introduction of the *Wet uitbreiding loondoorbeta-*

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*lingsplicht bij ziekte* (*WULBZ*)[1] (Obligation to Continue to Pay Wages (Extension) Act). This Act set the employers' obligation to continue salary payments at 52 weeks, but was especially significant because the *Ziektewet* was also amended. Since the introduction of the *WULBZ*, a sick employee is generally entitled to a benefit under the *Ziektewet* only when his employer is not (or no longer) obliged to continue salary payments. The primacy for income continuity during sick leave, therefore, has been shifted to the employer.[2]

The main objective underlying the introduction of the *WULBZ* was a reduction in the number of new invalidity benefit claimants. By making the employer primarily responsible over a longer period of time for his sick employees' income, the legislator intended to give a considerable financial incentive to promote an employee's rehabilitation into his own, an adapted, or suitable workplace, thus avoiding claims for invalidity benefits.[3]

As the legislative change generated insufficient effect in this respect, regulations increasing the employee's and employer's responsibility for the rehabilitation of incapacitated employees were introduced after 1996. Especially important was the introduction of the *Wet verbetering poortwachter (WVP*) (Eligibility for Permanent Invalidity Benefit (Restrictions) Act) per 1 January 2002.[4] The purpose of this Act was to improve the rehabilitation achievements of both employer and employee.[5] Primarily, it introduced a number of procedural obligations for the employer. In case of potential long-term absence, for instance, the employer is now required to open a file on the course of the employee's occupational disability; he is required to draft an action plan in consultation with the employee and the *Arbo-dienst* (occupational health and safety service) and periodically evaluate this plan. In addition, the *WVP* also introduced some substantive rehabilitation obligations in legislation. Pursuant thereto, the employer is obliged to take measures and give instructions as is reasonably necessary to enable the employee to perform his own work or other suitable work. If it is established that an employee can no longer perform his own work, and that there is no other suitable work for him in the employer's business, an employer is required to promote the employment of that employee in another employer's business (7:658a *BW* [Dutch Civil Code]).

1 *Staatsblad* 1996, 134.
2 W.J.P.M. Fase, *Wet uitbreiding loondoorbetalingsplicht bij ziekte*, Deventer: Kluwer 1996, p. 11; B. Hoogendijk, *De loondoorbetalingsverplichting gedurende het eerste ziektejaar* (diss. Rotterdam), Rotterdam: Sanders Instituut 1999, p. 52; C.F. Sparrius, *De verantwoordelijkheidsverdeling voor de inkomensbescherming van zieke werknemers* (diss. Amsterdam VU), Maastricht: Skaker Publishing BV 2001, p. 104; I.P. Asscher-Vonk et al., *De zieke werknemer*, Deventer: Kluwer 2007, p. 108.
3 *Kamerstukken II* 1995/96, 24 439, nr. 3, p. 1-3.
4 *Staatsblad* 2001, 628.
5 B. Barentsen & J.M. Fleuren-Van Walsem, *Wet verbetering poortwachter*, Deventer: Kluwer 2002, p. 11.

The *WVP* does not only impose obligations on the employer; the employee has clearly been made co-responsible for his own rehabilitation. He has to adhere to reasonable rules and regulations imposed by the employer, *Arbo-dienst*, or rehabilitation agency, cooperate in rehabilitation measures taken by the employer, and is required to perform suitable work offered by the employer (article 7:660a *BW*). This notion entails more than work previously agreed upon. Suitable work means work for which an employee is capable and competent, unless the performance of such work cannot be required for reasons of a physical, mental, or social nature.

Should the *employer* fail to comply with his obligations under the *WVP*, the *UWV* (Employee Insurance Agency) will extend the period the employee is entitled to continued salary payments with a maximum of 52 weeks. Should the *employee* fail to comply with the obligation to cooperate in his own rehabilitation, his entitlement to continued salary payments will lapse, he faces dismissal, and the *UWV* may, fully or partially, refuse to pay the benefit entitlement under the *WAO*.

The *WVP* was an important step in the legislative process, more closely defining the principle 'work above income'. Subsequent legislation introduced the *Wet verlenging loondoorbetalingsverplichting bij ziekte* (*WVLZ*)[6] (Act on the continuation of pay during illness), which extended the employer's obligation to continue salary payments from one to two years; and replaced the *WAO* by the *Wet Werk en inkomen naar arbeidsvermogen* (*WIA*)[7] (Work and Income according to Labour Capacity Act), in which the rehabilitation obligations for both employer and employee have again been tightened up.[8]

Since then, the *WVP* has been evaluated. This evaluation has shown that 'since the introduction of the *WVP*, substantial volume effects on health-related absenteeism and the number of new invalidity benefit claimants have indeed been achieved'. The evaluation found that, even though it is difficult to establish exactly to which degree the *WVP* has contributed to the reduction in the number of new claimants, it is obvious that the *WVP* has had a positive effect. It also showed that the objectives of the *WVP* have been more than met, and that it has proved to be effective. 'The *WVP* has given a powerful impulse to the timely approach of health-related absenteeism and rehabilitation by work organisations, and with that to the actual reduction of health-related absenteeism and the number of new invalidity benefit claimants.'[9]

6 *Staatsblad* 2003, 555.
7 *Staatsblad* 2005, 572.
8 B. Barentsen, *Wet werk en inkomen naar arbeidsvermogen*, Deventer: Kluwer 2006.
9 *Kamerstukken I* 2005/06, 27 678, nr. A.

***Liability and the duty to mitigate***
If the illness of the employee was caused by an accident or event for which another party is liable, the employee will also have to deal with the liable third party. From that liable party, the employee can recover the part of his damage not compensated by the continued salary payments and a possible *WIA*-benefit.

In liability law full compensation of damage comes first. In addition, the principle is that the culprit takes the victim as he finds him. A specific mental or physical condition provides no ground for limiting the liability for compensation. Financially the injured party, to the extent possible, should be restored to its position before the accident.[10]

These 'victim friendly' principles are limited, *inter alia*, by the duty to mitigate based on article 6:101 subsection 1 *BW*. The injured party is obliged to mitigate to the extent that can reasonably be required of him. What will be required of the victim depends on the circumstances of the case.[11] In this process the injured party is usually spared to some extent, since it was the culprit's behaviour that put him in a position necessitating mitigation.[12] The emphasis thus lies far more on the responsibility of the culprit, than on that of the victim. So far the differences have not been mapped systematically, but based on what *is* known, it can be concluded that this is the reason the employee is expected to make much more of an effort to rehabilitate as regards his relationship with the employer than as regards his relation-ship with the liable third party.

If an employee suffers personal injury through the actions of another party, his employer suffers damage as well. After all, the employer will have to continue to pay at least 70% of the employee's salary, and will incur rehabilitation costs. A provision has been included in legislation enabling the employer to recover the sick employee's net salary costs from the liable third party (article 6:107a *BW*). A similar right of recourse to recover the expenses incurred by *UWV* under the *WAO* and *WIA* has been included in those Acts.[13] The liable third party has the same defence possibilities against the recovery claim of the employer and *UWV* as he would have had against the injured party. Circumstances that can be imputed to the victim will, therefore, as a rule also influence the extent of the employer's recourse claim.

10 S.D. Lindenbergh, 'Schadevergoeding, een kwestie van techniek en moraal', in S.D. Lindenbergh et al. (eds.), *Schade: vergoeden of beperken,* Den Haag: Sdu Uitgevers 2004, p. 1, 3-4; J. Spier et al., *Verbintenissen uit de wet en schadevergoeding*, Deventer: Kluwer 2006, p. 246-248.

11 HR 5 October 1979, *NJ* 1980, 43 (*Tauber/Verhey*).

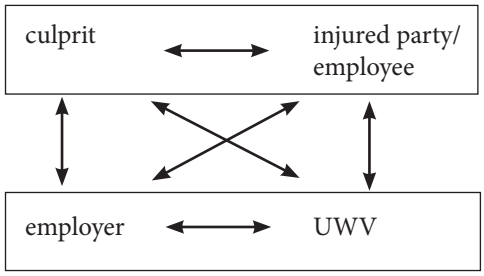
12 A.L.M. Keirse, *Schadebeperkingsplicht*, Deventer: Kluwer 2003, p. 118.

13 See also: E.F.D. Engelhard, 'Naar een nieuw criterium voor de vergoeding van derden: het voorontwerp Inkomensschade en het wetsvoorstel Re-integratiekosten', *Verkeersrecht* 2008, p. 1; M. Keijzer-de Korver, 'Schade van de werkgever bij arbeidsongeschiktheid werknemer door toedoen van een ander', *TVP* 2006, p. 117.

Special provisions dealing with costs incurred accommodating the workplace and other rehabilitation costs have recently been included in legislation. In the past, the employer could only recover the costs of rehabilitation measures the employee, had he incurred such costs himself, also could have recovered (article 6:107 *BW*). To remove any uncertainties as to the scope of this right to recover, a provision was added to article 107a Book 6 *BW* obliging the liable party to compensate 'reasonable costs' incurred by the employer in order to comply with the rehabilitation obligations laid down in article 7:658a *BW*. The reasonableness test does not pertain to the measure itself, but only to the level of the costs of the measure.[14] This seems to render it impossible for the liable third party to question the relevance of certain measures for his obligation to compensate the loss of income.[15]

***A complex system***

The above illustrates a complex system of interrelated rights and obligations when an employee suffers personal injury due to the action of another party and consequently becomes unfit for work for a long period of time. Diagrammatically the system looks like this:




In this complex system, the employer, the employee, the *UWV*, and the liable third party have rights and obligations with respect to the rehabilitation of the employee, but these rights and obligations are not coordinated. For instance, in his legal relationship with the liable third party the victim has to cooperate in restoring his capacity to earn an income, but this obligation – at least as interpreted in case law and literature until now – is less far-reaching than the cooperation expected of him as an employee in his relationship with his employer. A consequence could be that, if the victim is employed, the liable third benefits from the activities performed by others (employer, employee, *Arbo-dienst*, rehabilitation agency) in their compliance with the *WVP*.[16]

Several behavioural reactions are conceivable. The financial incentives introduced with the *WULBZ* and the *WVP* will lose some of their effect if the damage can be

14 *Kamerstukken II* 2006/07, 31 087, nr. 3, p. 4.
15 Engelhard 2008, p. 4-5.
16 W.H. van Boom, 'De gevolgen van Poortwachter voor de civiele letselschadepraktijk', *NJB* 2004, p. 928, 934.

recovered from a liable third party. The economic necessity for the employer to rehabilitate the sick employee is less urgent if he is able to pass on the salary costs to a third party. The liability of a third party may also influence the attitude of the employee. Perhaps he will be less inclined to cooperate in a speedy rehabilitation because it would minimize his claims to compensation. Should he lose his entitlements to salary payments and/or social security benefits as a result of that attitude, it may well be possible for the employee to claim the loss of income as damage from the culprit. After all, non-compliance with the *WVP*-obligations will not automatically constitute a violation of the duty to mitigate he has towards the culprit.[17] As indicated, there is a considerable gap between both obligations.

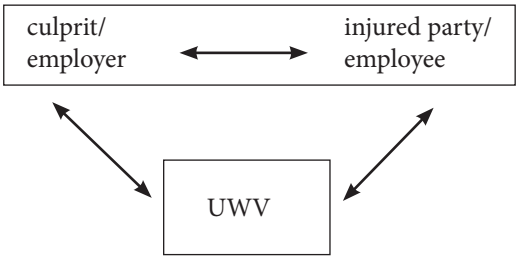
Should the interaction between the duty to mitigate and the rehabilitation obligations indeed bring about the aforementioned behavioural reactions, it means that the positive effects the *WVP* has had could possibly be annihilated. The financial incentives the *WVP* relies on to encourage employees to return to gainful employment could be lost in case a sick employee is also a personal injury victim.

A first survey among occupational physicians furthermore shows that the specifics of the rehabilitation process may differ according to whether the employer can pass on the costs thereof to a liable third party. If the costs can be recovered, a 'luxury' process is opted for sooner, which sometimes also takes longer. This could also be to the advantage of the employee, as there is a greater chance of returning to work at a level close that of the duties performed before the onset of the occupational disability. It could have adverse effects for the liable third party, since a discussion on the benefit and necessity of the rehabilitation measures seems virtually out of the question.

***Being employer and culprit***

In a considerable number of cases, the system outlined above of cohesive but uncoordinated rights and obligations is even more complex. If the illness of the employee is a consequence of an occupational injury or of his working conditions, the employer is often liable for the employee's damage under article 7:658 and/or 7:611 *BW*. The employer, in that case, has the dual capacity of employer *and* culprit. The diagram shown above in that case is:

17 Van Boom 2004, p. 934; S. Klosse, 'Vergoeding als noodverband', *AV&S* 2003, p. 25, 32. See also: S. Klosse, 'WIA: prikkel tot werk of tot een toenemend gebruik van het aansprakelijkheidsrecht?', *AV&S* 2006, p. 139, 148.




The coincidence of different capacities may have peculiar consequences. It is conceivable, for instance, that an employee who no longer receives salary payments because of his failure to comply with his rehabilitation obligations towards his employer, may try to recover those salary payments as loss of income under article 7:658 *BW* from that same employer. Since the victim's obligations to mitigate are not as far-reaching as the employee's *WVP*-obligations, this claim may be awarded. On the other hand, the employer may be less inclined to use his powers with respect to the employee's rehabilitation if he is responsible for the employee's occupational disability. Another possible scenario, however, is that the employer tries to minimize the recoverable damage by giving more attention to the employee's rehabilitation. This in turn carries the risk that the employer uses the powers granted by the *WVP* to promote the rehabilitation of the employee, to minimize his own liability for compensation.

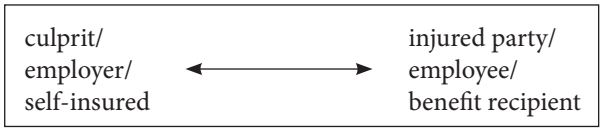
***Liable employer as self-insurer***

There is yet another variant of the aforementioned case. After the period of continued salary payments by the employer, the incapacitated employee, provided conditions are met, is entitled to a benefit under the *WIA*. The *WIA* has provided for the possibility to charge the benefit of the employee (the insured) to the employer during a number of years. This leads to certain financial benefits for the employer. The employer is then considered self-insured.

Self-insurance already existed under the *WAO*, but at that time the responsibility for the rehabilitation rested with the *UWV*. Under the *WIA*, however, the self-insured is responsible for the rehabilitation, even when the employee is no longer employed by him. The legislature considers the self-insured as an administrative body with public powers, such as the possibility to partially refuse the employee's benefit if he fails to comply with his obligations as a benefit recipient. In other words, the self-insured is both government and private individual at the same time.[18]

18 W.L. Roozendaal, 'De eigenrisicodrager een bestuursorgaan', *SMA* 2006, p. 235, 238; B. Marseille & E. van Wolde, 'De werkgever als bestuursorgaan', in M. Herweijer, G.J. Vonk & W.A. Zondag (eds.), *Sociale zekerheid voor het oog van de meester*, Deventer: Kluwer 2006, p. 295; E.J.A. Franssen, 'Het eigenrisicodragerschap voor de WIA: meer haken en ogen dan men denkt', *Arbeidsrecht* 2008, p. 7, 11.

In case of an occupational injury or occupational illness for which the employer is liable, parties then fulfil three legally different roles:




The authority to cut back a *WIA*-benefit provides the self-insured with a tool to persuade the employee to cooperate in his own rehabilitation. This also carries the risk, however, that this authority is used to minimize the possible liability for damage resulting from an occupational injury or occupational illness. On the other hand, the possibility that the employee recovers the cut in his benefit from the employer as loss of income under article 7:658 *BW* cannot be excluded either. In that case, the authority to impose sanctions in the framework of the *WIA* loses much of its regulatory effect on behaviour.

### 4.2.2. RESEARCH QUESTIONS AND APPROACH

This study aims to provide insight in the mutual influence of civil liability law and labour and social security laws as regards the obligations of an employee aimed at returning to gainful employment.

The study can be divided into several research questions:

1. The duty to mitigate in civil liability law and the rehabilitation obligations in labour law and social security law will be identified. We will examine to what extent the employee's obligations under the aforementioned areas of law differ from each other.

2. We will examine in what ways interaction between the different areas of law is theoretically possible, and pay specific attention to the underlying objectives of the various areas of regulations.

3. We will explore in what way interaction between the two areas of law takes place in practice. For example, whether, and to what extent, the rehabilitation process differs depending on the circumstance that the salary and rehabilitation costs can be passed on to a third party. Will such a circumstance lead to a more 'luxurious' process, for instance, and/or to a different appreciation of the process by the parties involved? We will explore whether, and to what extent, the personal injury process differs depending on the circumstance that the personal injury victim is also an employee with the obligation towards his employer to rehabilitate as soon as possible. Will the liable party await the outcome of the rehabilitation process,

for example, before he compensates the damage? We will also examine how the differences found can be explained.

4. We will explore whether, and to what extent, the rehabilitation process is influenced by the circumstance that the employer is liable for the damage the employee suffers due to an occupational injury, or by the circumstance that the employer is self-insured and at the same time liable for the damage suffered due to an occupational injury. Could it be that the powers granted to the employer/self-insured for the promotion of the rehabilitation are used differently than when the personal injury is a result of an event for which the employer is not liable?

5. We will examine if the law as it stands provides sufficient guarantees against an employer's misuse of powers granted for the realization of the employee's rehabilitation.

In answering the question about the differences in the rehabilitation and personal injury process, the influence of an insurance covering the damage and/or salary and rehabilitation costs will also be considered.

6. The question will be answered how medically, the best possible rehabilitation results can be reached and how to best manage the process of damage assessment in the framework of the personal injury process.

The study will result in a number of proposals for the improvement of the harmonization between civil liability law and labour and social security law.

In a large part of the study the classical legal method will be applied. This entails: a thorough analysis of the legislative text, the legislative history, scientific literature, policy documents, and (published) case law.

In answering the question what the law entails, we will use a classical form of law finding. According to this method, an Act can be interpreted in five different ways, namely: historically, grammatically/textually, systematically (the context rule), teleologically, and legal-historically. There are five different factors to consider, therefore, when interpreting an Act: the history of the Act, use of language, the system of the law as a whole, societal objective and effects of its application, and the historical development. This method of law finding is also used by the courts.[19]

Using the classical legal method, we will primarily identify the duty to mitigate, the rehabilitation obligations, and the theoretical possibilities for interaction between the various obligations. The objectives from both regulatory domains will be

19 See also: P. Scholten & G.J. Scholten, *Mr. C. Asser's handleiding tot de beoefening van het burgerlijk recht. Algemeen deel*. Deel I, Zwolle: W.E.J. Tjeenk Willink 1974, p. 33-36.

listed. This method will also be applied to answer the question whether the law as it stands provides sufficient guarantees against an employer's misuse of his powers to promote the employee's rehabilitation. Therefore, research questions 1, 2 and 5 will be answered using the classical legal method.

Research questions 3 and 4 will be answered through empirical research. Through focus groups, we will seek answers to the questions whether the circumstance that salary and rehabilitation costs can be passed on to a third party results in a different rehabilitation process, whether the circumstance that a personal injury victim is also an employee results in a different personal injury process and whether and to what extent the rehabilitation process can be influenced by the circumstance that the employer is liable for the employee's damage, or by the circumstance that the employer is self-insured and at the same time liable for the damage. Additionally, we will examine whether such circumstances cause the parties involved to appreciate the processes differently. We will gather information through focus groups with occupational physicians, personal injury lawyers and third party liability insurers. Three or four focus groups with six to eight people, will be conducted with every type of participant. Respondents will be selected by approaching several businesses, law firms and insurers. To avoid one-sidedness of information, a number of businesses will be approached for each group. The focus groups will be recorded, and later transcribed. The analysis will be carried out using the atlas.ti programme. Information will be processed anonymous.[20]

To answer research question 6, we will review medical-scientific publications systematically to determine how to best direct the rehabilitation process in order to achieve the best possible results. And to assess how the process of damage assessment in the framework of a personal injury process can best be handled, literature will be studied, in particular the *Gedragscode behandeling letselschade* (Code of Conduct for Handling Personal Injury Claims) which specifically deals with this question.

The last part of the study will be evaluative in nature. Previous findings of the study will be incorporated in the proposal for the improvement of the rehabilitation process of personal injury victims. Because the duty to mitigate and the rehabilitation obligations have been identified at the beginning of the study, we have a complete picture of the scope of the different obligations. The underlying objectives from the different regulatory domains play an important role and these should be safeguarded where possible. The aim is an optimal degree of interaction between the areas of law. In this, it is important to avoid undesirable consequences of interaction. The outcome of the empirical part of the study will be an important source of information for drafting the proposals. There may be forms of interaction

20 R. A. Krueger & M. A. Casey, *Focus groups: a practical guide for applied research,* Thousand Oaks, Calif: Sage Publications 2009.

which in practice are considered highly desirable, or, to the contrary, undesirable. It is important to take this into account. The appreciation of the parties is another factor to consider. In conclusion, we will also assess how to best direct the rehabilitation process in order to optimize its results, and how to best handle the process of damage assessment in the framework of the personal injury process. We deem it desirable that the proposals made for harmonization of the different areas of law promote, rather than hinder, a proper management of rehabilitation and the personal injury process.

The proposals for the harmonization of the duty to mitigate and the rehabilitation obligations that will eventually be submitted are aimed at striving for an optimal result in the rehabilitation of personal injury victims.